United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7240

(42200)

To be argued by
WILLIAM P. DEWITT

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES LABOR PARTY, a/k/a NATIONAL CAUCUS OF LABOR COMMITTEES; ANTON H. CHAITKIN; ELIJAH C. BOYD; DAVID WOLINSKY; ROBYN PRESS; JEFFREY BRYAN,
Plaintiffs-Appellees,

—against—

MICHAEL J. CODD, individually and as Commissioner of the Police Department of the City of New York,
Defendant-Appellant,

and ANTHONY ELAR, individually and as Chief of Police of Freeport, Long Island,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Preliminary Statement

In this action for declaratory and injunctive relief the plaintiffs attack the constitutionality of § 435-6.0(h) of the Administrative Code of the City of New York, providing for regulation of sound amplification devices and imposing a five dollar fee for permits to use such devices. Defendant Michael J. Codd, Police Commissioner of the City of New York, appeals from an order of the United States District Court for the Eastern District of New York

(Weinstein, J.), entered March 11, 1975, which, after an evidentiary hearing, permanently enjoined this defendant from collecting from plaintiffs the fee of $5.00 per permit required by § 435-6.0(h).*

Questions Presented

1. The first question presented is: May a license fee be imposed for permits to use sound devices in public areas, where the fee imposed is related to the cost of administration of a valid scheme for regulating such devices in public areas and such fee has not been shown to create an unreasonable or undue burden on the expression of ideas, notwithstanding such fee does impose some burden on First Amendment protected activities?

2. Assuming that such a fee may be imposed and that the fee involved here is otherwise lawful, certain subsidiary questions are here presented. These questions have to do with the fact that, although this case was not tried on this theory, the District Court, in its opinion, indicated that it was of the view that the regulation of sound devices could be effectuated in a more economical manner than that followed by the City, and suggested that this consideration was relevant to its decision to hold the fee charged unconstitutional. There was no evidence introduced which would indicate what in fact the actual cost of such an alternative system of regulation would be. In addition, as the case was not tried on this theory, the

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* Plaintiffs named as defendants, not only Commissioner Codd but also Anthony Elar, Chief of Police of Freeport, Long Island. The case against Elar was dismissed with prejudice in contemplation of a stipulation to be entered into with respect to resolving plaintiffs' dispute with the Village of Freeport (50a).

defendant had no opportunity to offer proof as to why the procedures presently followed are preferable to the Court's belatedly suggested alternative. Under these circumstances, questions are presented as to the degree to which the defendant is required to adopt less expensive methods of regulation and as to whether the defendant should have been allowed an opportunity to offer proof on these issues. In addition, it is the defendant's position that, even on the record before this Court, enough has been demonstrated as to what must be done in order to properly regulate sound devices, even in the manner which the District Court suggested as a viable and less expensive alternative, to fully justify this very minimal fee.

Facts

(1)

The Administrative Code of the City of New York, § 435-6.0, provides for the regulation of sound amplification devices within the City of New York. The regulation is accomplished by issuing permits to prospective users who comply with the regulatory provisions of the ordinance. The ordinance also requires that each applicant for a permit pay a fee of five dollars per permit, which permit is good for one day at any number of pre-indicated and approved locations. Plaintiffs, initially claiming that they were unable to pay the five dollar fee, brought this action, seeking, *inter alia,* a judgment declaring that so much of the ordinance as requires a fee be paid is unconstitutional and enjoining the defendant from enforcing it. At the evidentiary hearing held February 24, 1975, plaintiffs discontinued without prejudice all parts of the complaint other than the allegation that the fee portion of the statute

435.6.0(h) was unconstitutional (61a). In addition, plaintiffs specifically declined to offer any proof on the issue of their financial ability or inability to pay the fee. At the close of the evidentiary hearing, the District Court noted (91a):

"We are dealing here really with a matter of law."

Plaintiffs, a minor political party, and persons alleged to be members of such party, claimed as their purpose in seeking these permits their desire to place candidates of their party on the ballot in a state-wide election (12a-13a).

The District Court found that there was overwhelming evidence that the cost to the city for processing the permits involved was over ten dollars per permit (102a). The Court also stated that a "detailed time and motion study might easily justify a cost to the city four or five times the fee charged" (*id.*).

The Court also stated, however (*id.*):

> "There is little doubt that the city would save money were it to issue permits without fee at the precinct level, thus eliminating the need for extensive record-keeping and processing."

Based upon this conclusion, the Court then stated that the city had not demonstrated "overwhelming need" for charging the five dollar fee (*id.*).

Later in its opinion, the Court indicated that it was of the view that in any event the costs of a regulatory scheme of this sort should be borne by the public and not "placed entirely upon those who have the urge to speak publicly in an amplified manner" (108a). It then commented that in this case there was the "additional factor" that, accord-

ing to the Court, "the cost to the majority would actually be reduced if no fee were charged, since collecting the fee costs more than is collected" (*id.*). This latter statement we read as referring to the Court's suggested, presumably less expensive alternative of issuing the permits at the precinct house as compared with the defendant's centralized procedure. We do not read the statement as a finding that simply *collecting* this fee costs more than is realized, since there is no evidence in the record that would support such a finding.

(2)

At the hearing the defendant stipulated that the burden was on it to show that the five dollar fee was reasonably related to the cost of administering this regulatory scheme (61a). As indicated above, the District Court found that the evidence was "overwhelming" that the cost of the program, as administered, was over $10.00 per permit (102a). As noted, however, the Court suggested, in its opinion, that this program, if administered on a decentralized basis, could be operated more economically, a consideration which it suggested constituted an alternative or additional justification for its holding (*id.*). Although this case was not tried on this theory, and there is no finding of what the precise cost would be to defendant to administer the ordinance in the manner suggested by the Court, there is, we believe, more than ample evidence in the record, realistically viewed, demonstrating that even if the ordinance were administered as the Court suggested, its cost would be in excess of the modest fee now charged.

The defendant's witness, William Quigley, Administrative Manager of the License Division of the New York

City Police Department (62a), testified in detail as to the procedures used in administering this ordinance both at central headquarters and at the precinct level. These procedures necessarily include, at a minimum, the initial receipt and processing of applications at the precinct house, determination of the appropriateness of the proposed location or locations where the device is to be used (which may require that officers be sent to view proposed locations), procedures for appealing disapproved applications and the suggesting of alternative sites, and, finally, when the application is approved, the permit itself must be prepared. In addition, there must be at least some record made of permits issued, so that not more than one permit is issued for any one location at any one time. See generally, Mr. Quigley's testimony at pp. 63a to 74a. However minimal these various functions may appear, it should be borne in mind that they still have to be performed—at some cost—and, realistically, from a true cost accounting standpoint, we do not see how these various necessary functions could be performed for anything less than the amount of this fee.

ARGUMENT

The challenged ordinance is a reasonable and constitutionally valid exercise of the city's police power. The fee imposed, which is related to the actual cost of administering the ordinance, and does not impose an unreasonable burden on First Amendment rights, is not unconstitutional.

(1)

That portion of the ordinance challenged, Administrative Code § 435-6.0(h), provides as follows:

> h. Fees—Each applicant for a permit issued under the provisions of this section shall pay a fee of five dollars for the use of each sound device or apparatus for each day, provided, however, that permits for the use of such sound devices or apparatus shall be issued to any bureau, commission, board or department of the United States government, the state of New York and the city of New York without fee.

As the District Court correctly noted, "the right to speak publicly on electoral matters is 'fundamental' and 'preferred'" (102a) and a tax on that right is unconstitutional. See *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113 (1943) (cases holding that a "license tax" on engaging in a constitutionally protected right, i.e., freedom of the press, is unconstitutional). See also *Kramer* v. *Union Free School District*, 395 U.S. 621, 626, 630 (1969), holding that a requirement of payment of a tax in order to exercise franchise rights must

be carefully and meticulously scrutinized to determine if the right to vote is compromised by a compelling state interest. Cf., *Hull* v. *Petrillo,* 439 F.2d 1184, 1185-86 (2d Cir. 1971).

However, when the District Court ruled as a matter of fact that the fee involved was reasonably related to the cost of enforcement of the ordinance (91a), in effect, it ruled that the fee in question was not a *tax* on a constitutional right. This factual distinction separates this case from the above cases which hold fee statutes constitutionally infirm as a tax upon fundamental constitutional rights.

In *Cox* v. *New Hampshire,* 312 U.S. 569 (1941), the Court stated (at 577):

> "The fee was held to be 'not a revenue tax but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed'. There is nothing contrary to the constitution in the charge of a fee limited to the purpose stated."

The Court in *Cox,* which involved a parade permit fee, distinguished *Lovell* v. *Griffin,* 303 U.S. 444 (1938) and *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496 (1939), on the ground that those cases involved the vesting of absolute power over exercise of First Amendment rights in local officials.

In *Murdock* v. *Pennsylvania, supra,* 319 U.S. 105, cited and relied on by the District Court in the case at bar, the Supreme Court did not overrule *Cox.* Rather, the Court distinguished *Cox* from cases involving taxes on fundamental constitutional rights (319 U.S. at 116):

> "Nor do we have here, as we did in *Cox* v. *New Hampshire, supra,* and *Chaplinsky* v. *New Hampshire, supra,* state regulation of the streets to protect and insure the safety, comfort or convenience of the public."

Insofar as we can determine, *Cox* remains the law as declared by the Supreme Court, and this view is supported by the one case of which we are aware which, on its facts, is closest to the case at bar, *Chester Branch, N.A.A.C.P.* v. *Chester,* 253 F. Supp. 707 (E.D. Pa. 1966). In the *Chester* case the Court struck down a $25.00 per day sound device fee, but only on the ground that there the municipality had failed to show how its license fee was related to the cost of regulation. There, the Court clearly indicated that had the municipality put in evidence showing a cost justification for the fee imposed, the Court would have followed *Cox* and upheld the fee—subject, no doubt, to a concept of "reasonableness" of the fee even as cost justified. See 253 F. Supp. at 713 ("Notwithstanding that a license fee reasonably calculated to defray the cost of enforcing such an ordinance would be sustained . . . .").

In this case it is not the defendant's position that any fee, no matter how high, may validly be imposed, just so long as the fee can be cost justified. The important First Amendment considerations here involved cannot be blinked. Clearly, any fee imposed in this context, even a most modest fee, imposes some burden on protected speech and the political process, and application of a balancing process is called for. Cf., *Konigsberg* v. *State Bar of California,* 366 U.S. 36, 51 (1961):

> " . . . general regulatory statutes not intended to control the content of speech but incidentally limiting its un-

> fettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass *when they have been found justified by subordinating valid governmental interests,* a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. See, e.g., *Schneider* v. *State,* 308 U.S. 147, 161, 84 L.Ed. 155, 60 S. Ct. 146; *Cox* v. *New Hampshire,* 312 U.S. 569, 85 L.Ed. 1049, 61 S. Ct. 762, 133 ALR 1396" (further citations omitted) (emphasis supplied).

And, as the Court continues in *Konigsberg* (at p. 51):

> "Whenever in such a context these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires a weighing of the respective interests involved."

In examining the "incidental" burden here imposed on persons intending to use sound devices in public places in this City and in examining the respective interests involved, certain considerations come immediately to mind. Perhaps the first such consideration is the simple, stark fact, a reality of politics in this country, that ordinarily it costs money to gain public exposure and to communicate one's point of view to large masses of people. This is so whether the means chosen is television or radio, mailings, newspaper advertisements, pamphleteering, or even the use of sound amplifiers. In short, no sort of political activity can be effectively conducted without the incurring of some cost. And, indeed, it appears beyond dispute that certain of these costs may be imposed by

government. E.g., sales taxes on materials (including amplification devices), postage, real estate taxes (paid directly or indirectly on political headquarters), payroll taxes and unemployment insurance paid for salaried employees, tolls and fares on public transportation.

All of the above are incidental burdens on political activity, yet they are accepted as lawful. The fee at issue here is, we would concede, not quite as incidental or indirect a burden on speech as the above, but it is not so unlike those burdens as to make it automatically unlawful, and it is still, in any event, nothing more than a quite indirect, incidental burden on speech.

Another consideration that comes to mind is the fact that, viewed realistically, this is a modest fee, which in fact plaintiffs never demonstrated they could not pay.

Finally, it should be borne in mind that, while the regulation involved here is primarily for the public benefit, the public is not the sole beneficiary of such regulation. The licensees also benefit, in that through this regulation some order is imposed on the use of such devices and the City is not turned into an amplified Hyde Park—which it would be were there no limit on the number of loud speakers that could be used at a single location. To this extent, then, the City's regulation of this activity renders a service to licensees, just as the postal authorities render a service in delivering campaign mail, for which it is accepted that postage fees may be charged.

Ultimately, however, it seems clear that each case involving a burden on speech such as that imposed here has to be analyzed on its particular facts, and a balancing of interests analysis employed. On balance, we submit,

this fee is so modest and so incidental a burden on speech, and the public interests involved are so clearly legitimate, that the fee should be upheld. It was the view of the District Court that this cost should be borne in its entirety by the public, but that view flies in the face of the *Cox* decision and, in addition, seems to unfairly place upon the public the entire burden of a cost which, in fairness, those wishing to engage in political activity should be required to bear.

(2)

There has been no showing here that this ordinance was enacted or is enforced to stifle political expression, cf., *Hull* v. *Petrillo, supra,* or for the purpose of excluding minority party candidates from the ballot, compare *Lubin* v. *Parish,* 415 U.S. 709, 712-715 (1974); *Bullock* v. *Carter,* 405 U.S. 134 (1972). Nor has it been demonstrated that the ordinance has any such effect, or even probably has such effect.

Nor, it may be noted, does this ordinance impose an absolute bar to access to the ballot, compare *Lubin* v. *Parish, supra,* 415 U.S. at 718, or a burden that has been shown to be unreasonable.

Not every limitation or incidental burden on the exercise of First Amendment rights is subject to a stringent standard of review. As the Court noted in *Bullock* v. *Carter, supra* (at p. 143):

> ". . . the existence of . . . barriers [to access to the ballot] does not of itself compel close scrutiny. Compare *Jenness* v. *Fortson,* 403 U.S. 431 (1971) with *Williams* v. *Rhodes,* 393 U.S. 23 (1968). In approach-

ing candidate restrictions, it is essential to examine in a more realistic light the extent and the nature of their impact on voters."

(3)

With respect to the District Court's suggestion that this license fee may be unconstitutional because, in the Court's view, this activity could be regulated at less cost than at present, we can be quite brief.

First, while clearly there would be cause for judicial intervention were this a demonstrably wasteful and expensive bureaucratic undertaking, unnecessarily inflating the cost of licenses all out of proportion to what is reasonable, we are not at all certain that it is the proper role of the courts to intervene in local government to the extent that the District Court has here suggested is appropriate.

Second, on any realistic view, we do not see how, even if the ordinance were administered as the District Court suggested, the cost of regulation could be reduced below the level of this fee. On any valid cost accounting basis even one hour of a New York City police officer's time has got to cost the City at least five dollars.

CONCLUSION

The order appealed from should be reversed.

July 3, 1975

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

Joel Eglinski

being duly sworn, says, that on the 3 day of JULY, 19 75

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of the annexed APPELLANTS- BRIEF upon J.C. CARLISLE II Esq.,

the attorney for the PLAINTIFFS-APPELLEES in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Joel Eglinski

Sworn to before me, this 3
day of July, 19 75

John Calia

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